In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 829

GEORGE NEFF ROWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 19) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 17, 1964. The order of that court denying petitioner's timely motion for rehearing was entered on October 16, 1964 (Pet. App. 43). The petition for a writ of certiorari was filed on January 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether a discharge "for unfitness" awarded administratively under Air Force Regulation 39–17 is punitive in character.

766-041—65

2. Whether the Air Force followed its own regulations in discharging petitioner.

REGULATION INVOLVED

Air Force Regulation 39–17 provides in pertinent part:

> 2. POLICY. All commanders will maintain high personnel standards within the Air Force. Constant attention will be given to the problem of early recognition of unfit airmen and elimination in cases where rehabilitation has proven impossible or impractical. An airman will not be reassigned who has demonstrated unfitness for any of the reasons listed in paragraph 3a, until procedure outlined herein has been followed, except as provided in paragraph 5. Commanders who thus avoid proper disposition of substandard airmen are not accepting their command responsibility, create serious morale problems in the gaining unit, and add to the cost of final elimination.
>
> a. The discharge of enlisted personnel under this Regulation will be accomplished only after:
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> (1) Conclusive determination has been made that a mental or physical defect does not exist which would warrant consideration under AFM 35–4.
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> * * * * *
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> 3. PROCEDURE.
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> a. *Commander's Report.* When an airman has demonstrated that he is unfit for further retention in the military service for any of the reasons indicated in (1) and (2) below and his rehabilitation is considered impracticable after repeated attempts to accomplish

same have failed (except where attempts at rehabilitation are impracticable as in confirmed drug addiction), his commander will report the facts (see b below) to the next higher command and recommend that the airman be required to appear before a board of officers convened under the authority contained herein. The commander will make such a report if the airman:

(1) Gives evidence of habits or traits of character manifested by antisocial or amoral trend, *chronic alcoholism,* criminalism, sexual perversion, drug addiction, pathological lying, or other misconduct. * * * [Emphasis supplied.]

* * * * *

b. *Composition of Report.* The commander's report will include the following data:

* * * * *

(9) Report of medical officer, including statement that there are no mental or physical defects sufficient to warrant consideration under AFM 35–4. When applicable, report of psychiatric examination will be obtained. * * *

STATEMENT

On February 14, 1952, after passing his physical examination and being certified for duty without restriction, petitioner was accepted for reenlistment in the Air Force for a six year term. Between June 26, 1953, and April 21, 1954, petitioner was punished seven times for offenses involving intoxication. He was counseled after each of these occurrences by his superiors. Finally, on May 20, 1954, after certification by a medical officer that petitioner was a

chronic alcoholic and that he suffered from no mental or physical defect warranting his discharge as disabled under AFM 35–4, the commanding officer of petitioner's organization recommended that petitioner appear before a board convened under AFR 39–17, *supra,* pp. 2–3, to determine petitioner's fitness for retention in service. On May 28, 1954, petitioner, with his counsel, appeared before this board and was afforded a full hearing. The board found petitioner to be a chronic alcoholic and recommended that he be discharged for unfitness and given an undesirable discharge. On July 1, 1954, after the prescribed approval of the board's recommendation, petitioner was issued an undesirable discharge (Pet. App. 28–32).

Pursuant to petitioner's request to review the character of his discharge he was granted a hearing by the Air Force Discharge Review Board at which time he was again represented by counsel and was permitted to testify. The Board's recommendation that no change be made in petitioner's discharge was approved by the Secretary of the Air Force (Pet. App. 32).

Petitioner thereafter sought a change in the nature of his discharge from the Air Force Board for Correction of Military Records. After a hearing at which he testified and was represented by counsel, the Board's recommendation that petitioner's application be denied was adopted by the Assistant Secretary of the Air Force (Pet. App. 32–34).

Petitioner thereafter brought this action in the Court of Claims, seeking recovery of back pay on the claim that his discharge was void. In dismissing

his petition, the Court of Claims held (1) that petitioner's administrative discharge was not punitive and that, therefore, there was no infringement upon his rights by the failure to discharge him by court-martial under the Uniform Code of Military Justice; and (2) that the Air Force regulations for administrative discharges had been observed.

ARGUMENT

The judgment of the Court of Claims is correct and not in conflict with the decision of any other court. Accordingly, no question is presented meriting review by this Court.

1. Upon the premise that a discharge "for unfitness" under Air Force Regulation 39–17, *supra*, pp. 2–3, is punitive, petitioner contends: (1) that he was placed in double jeopardy in violation of the Fifth Amendment and of the Uniform Code of Military Justice [1] because he had already been punished for his seven offenses involving intoxication; and (2) that the Secretary of the Air Force did not have the power to eliminate petitioner from the Air Force through an administrative discharge under AFR 39–17 but was compelled to proceed by way of court-martial under the Uniform Code of Military Justice.

The short answer to petitioner's contentions is that a discharge for unfitness under the regulation is not punitive. The distinction between punitive "dishonorable" and "bad conduct" discharges issued pursuant to court-martial proceedings and "general" or "un-

[1] Article 44(a) of the Uniform Code of Military Justice 70A Stat. 52, 10 U.S.C. 844(a) provides "No person may, without his consent, be tried a second time for the same offense."

desirable" discharges resulting from administrative action is well recognized. See *United States* v. *Kingsley*, 138 U.S. 87, 90–92; *Grant* v. *United States* (Ct. Cl. No. 30–62, decided July 12, 1963), slip opinion, p. 8; *Reid* v. *United States*, 161 Fed. 469, 472 (S.D.N.Y.), appeal dismissed, 211 U.S. 529; *Matter of Nistal* v. *Haasauer*, 308 N.Y. 146, 154, 124 N.E. 2d 94, 98, certiorari denied, 349 U.S. 962.[2] Petitioner was given an undesirable discharge because, as a chronic alcoholic, he was unfit to serve as an airman. His discharge was intended not to punish, but to promote the efficiency of the service by eliminating a member whose retention would adversely affect morale and discipline. See AFR 39–17(2). Prior to his discharge, petitioner was given the benefit of full hearings with the assistance of counsel before the discharge board convened under the regulation, the Air Force Discharge Review Board and the Air Force Board for Correction of Military Records.[3]

2. Petitioner's final contention is that the procedures prescribed by the regulation for awarding an administrative discharge under AFR 39–17 were not observed. Specifically he claims that the Air Force failed to make a conclusive determination, as required

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[2] See also, Davis, *A Treatise on the Military Law of the United States* (3d ed., 1913), pp. 353–355, 356–357; Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1912), p. 435; Pasley, *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?* 41 Cornell L.Q. (1956) 545, 552–568; Winthrop, *Military Law and Precedents* (1920 ed.), p. 549.

[3] Such procedures were lacking in *Clackum* v. *United States*, 296 F. 2d 226 (Ct. Cl.), upon which petitioner relies (Pet. 11–12).

by AFR 39–17(2)(a), that there was no mental or physical defect warranting discharge for disability under AFM 35–4. As the Court of Claims found, this is simply not correct. Petitioner was examined prior to his discharge by a medical officer, who was a psychiatrist. His report certified that petitioner was a chronic alcoholic and there were no physical or mental defects warranting treatment under AFM 35–4 (Pet. App. 30).[4]

CONCLUSION

For the above reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

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MARCH 1965.

[4] Petitioner challenges this report because it makes no mention of his prior head injury or splenectomy, but the failure of the medical officer to make specific reference to these two circumstance is immaterial. Both had occurred prior to his renlistment in 1952 at which time petitioner passed his physical examination and was accepted for duty without restriction. No suggestion has ever been made that petitioner in fact suffered any disability from them or that he had not completely recovered. Petitioner, rather, attempts to cast doubt upon the medical officer's certification by noting that a splenectomy was then ratable under the Veterans Administration Schedule for Rating Disabilities as a 30% disability. The Veterans Administration disability ratings, however, are based upon statutes, regulations and policies far different from those governing retirement or discharge. *Holliday* v. *United States*, 128 Ct. Cl. 647, 649.

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